

1
2
3
4
5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

7 ALLAN PARMELEE,

8 Plaintiff,

9 v.

No. C11-5771 RBL/KLS

10 TONY DUNNINGTON, HARLAN
11 FINCH, DOUGLAS WADDINGTON,
12 RICHARD HAYWARD, SCOTT
13 RUSSELL, DANIEL WHITE, CPM
14 DAN VAN OGLE, MARCIA
SANCHEZ, ED HOSKINS, STEVE
RAMSEY, ELDON VAIL, and JOSEPH
GATCHELL,

15 Defendants.

REPORT AND RECOMMENDATION
Noted For: January 24, 2014

16 Plaintiff Allen Parmelee initiated this action by filing a complaint in Mason County
17 Superior Court against employees of the Washington Corrections Center (WCC) in Shelton,
18 Washington. Defendants removed the action to this Court and filed their answer in September,
19 2011. Dkt. 1, 6. On October 3, 2012, Defendants filed a Notice of Statement Noting Death,
20 stating that Defendants' counsel had learned from Department of Corrections' officials that Mr.
21 Parmelee passed away on October 2, 2013. Dkt. 120.

22
23 **DISCUSSION**

24 Federal Rule of Civil Procedure 25(a)(1) provides:

25 If a party dies and the claim is not extinguished, the court may order substitution
26 of the proper party. A motion for substitution may be made by any party or by the

1 decedent's successor or representative. If the motion is not made within 90 days
2 after service of a statement noting the death, the action by or against the decedent
must be dismissed.

3 Fed.R.Civ.P. 25(a)(1).

4 A statement noting the death must be served on parties in accordance with the
5 requirements of Rule 5. Fed. R. Civ. P. 25(a)(3). Federal courts, including the Ninth Circuit,
6 have strictly construed the service and filing requirements of Rule 25. In *Barlow v. Ground*, 39
7 F.3d 231, 233 (9th Cir.1994), the Ninth Circuit held that Rule 25 required two affirmative steps
8 to trigger the running of the ninety-day period. "First, a party must formally suggest the death of
9 the party upon the record. Second, the suggesting party must serve other parties and nonparty
10 successors of the deceased with the suggestion of death" *Id.*¹

12 On October 2, 2013, Defendants electronically filed a Statement of Death pursuant to
13 Rule 25 and mailed a copy of the Statement of Death to Mr. Parmelee's address at the
14 Washington State Penitentiary. Dkt. 120. It is unknown if Mr. Parmelee has any successors or a
15 personal representative.

17 The ninety-day time period of Rule 25 was triggered when Defendants filed the
18 Statement of Death on October 2, 2013. The ninety-day time period of Rule 25 has elapsed and
19 no motion for substitution has been filed on behalf of Plaintiff.

20 CONCLUSION

21 The Court should dismiss this action with prejudice pursuant to Rule 25.

22 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil
23 Procedure, the parties shall have fourteen (14) days from service of this Report and
24

25
26 ¹ In *Barlow*, the Ninth Circuit considered the version of Rule 25 that was in effect in 1994. The 2007 version does not differ in substance.

1 Recommendation to file written objections. See also Fed. R.Civ.P. 6. Failure to file objections
2 will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140
3 (1985). Accommodating the time limit imposed by Rule 72(b), the Clerk is directed to set the
4 matter for consideration on **January 24, 2014**, as noted in the caption.

5 **DATED** this 2nd day of January, 2014.
6

7
8 

9 Karen L. Strombom
10 United States Magistrate Judge
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26